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APPLIED ELASTOMERICS, INCORPORATED

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

APPLIED ELASTOMERICS,  
INCORPORATED, a California corporation,  
  
Plaintiff/Counter-Defendant,  
  
v.  
  
Z-MAN FISHING PRODUCTS,  
INCORPORATED, a South Carolina  
corporation,  
  
Defendant/Counter-Complainant.

Case No. C06-02469 CW

**APPLIED ELASTOMERICS  
INCORPORATED'S NON-  
OPPOSITION TO Z-MAN FISHING  
PRODUCTS, INCORPORATED'S  
ALTERNATIVE  
ADMINISTRATIVE MOTION TO  
AMEND THE BRIEFING  
SCHEDULE AND OPPOSITION TO  
Z-MAN FISHING PRODUCTS,  
INCORPORATED'S  
ADMINISTRATIVE MOTION TO  
STRIKE MOTION FOR  
SUMMARY JUDGMENT**

Date: N/A  
Time: N/A  
Ctrm: 2  
Judge: Hon. Claudia Wilken

1 Plaintiff and Cross-Defendant Applied Elastomerics, Incorporated (“AEI”) hereby files a  
 2 Statement of Non-Opposition to the Alternative Administrative Motion of Defendant and Cross-  
 3 Complainant Z-Man Fishing Products, Incorporated (“Z-Man”) to Amend Briefing Schedule and  
 4 hereby opposes the Administrative Motion to Strike filed by Z-Man.

5 **AEI’S NON-OPPOSITION TO Z-MAN’S ALTERNATIVE MOTION TO AMEND**  
 6 **BRIEFING SCHEDULE**

7 AEI notes that Z-Man has filed two alternative administrative motions. The first seeks to  
 8 strike AEI’s Motion for Partial Summary Judgment, which AEI opposes, as discussed further  
 9 below. The second seeks to amend the briefing schedule for the dispositive motions in this case  
 10 to comport with AEI’s understanding of the current briefing schedule. Because Z-Man is  
 11 proposing to amend the briefing schedule to comport with AEI’s understanding of the current  
 12 briefing schedule, AEI does not oppose this alternative motion.

13 AEI agrees that the Court should issue an order confirming the following six-week  
 14 briefing schedule in anticipation of the September 6, 2007 hearing date for dispositive motions:

15 August 9, 2007 (last day for Z-Man to oppose AEI’s Motion for Partial Summary  
 16 Judgment and to file any dispositive motion, contained in one brief)

17 August 16, 2007 (last day for AEI to file a reply on its Motion for Partial Summary  
 18 Judgment and to oppose any dispositive motion filed by Z-Man, contained in one brief)

19 August 23, 2007 (last day for Z-Man to file a sur-reply).

20 **AEI’S OPPOSITION TO Z-MAN’S MOTION TO STRIKE AEI’S MOTION FOR**  
 21 **SUMMARY JUDGMENT**

22 **I. INTRODUCTION**

23 Z-Man’s Motion to Strike AEI’s Motion for Summary Judgment is baseless and should be  
 24 denied. Z-Man erroneously asserts that the Court’s six-day continuance of the dispositive motion  
 25 hearing date in this case did not similarly continue the briefing deadlines, and therefore AEI’s  
 26 Motion for Partial Summary Judgment, filed on July 26, 2007, was untimely because it was not  
 27 filed six days earlier. Z-Man does not identify any rule or other authority to support its assertion.  
 28 Nor does Z-Man identify any prejudice that it would suffer if the briefing deadlines were

1 continued by six days, as AEI believes happened. Instead, Z-Man simply contends that AEI's  
2 Motion for Partial Summary Judgment is untimely, and therefore must be stricken, because the  
3 Court's Order continuing the dispositive motion hearing date did not also *expressly* continue the  
4 briefing schedule. Z-Man's contentions do not justify the extraordinary relief Z-Man requests.

5 First, AEI's interpretation of the Court's Order is consistent with the Local Rules, which  
6 provide that the continuance of a hearing date automatically extends the time to file opposition  
7 and reply papers. Second, AEI would be severely prejudiced if it is barred from filing a  
8 dispositive motion in this matter. In contrast, Z-Man suffers no prejudice under AEI's  
9 interpretation of the Court's Order and has even filed an alternative motion seeking the exact  
10 schedule that AEI believes is already in place. Third, granting Z-Man's request would result in a  
11 waste of judicial resources because it would deny the Court the opportunity to eliminate meritless  
12 claims and streamline this case. Fourth, barring AEI from filing its motion is unwarranted given  
13 Z-Man's tactics. Z-Man does not dispute that AEI previously informed Z-Man that AEI intended  
14 to file a summary judgment motion on July 26, 2007 or that Z-Man did not speak up regarding its  
15 own view of the deadline during that conversation or during the entire next week.

## 16 **II. RELEVANT FACTS**

17 On November 8, 2006, the Court entered its Initial Case Management Order ("Initial  
18 Order"). The Initial Order provided that dispositive motions would be heard on Friday,  
19 August 31, 2007. The Initial Order further provided a six-week briefing schedule, with AEI's  
20 opening brief due on July 20, 2007; Z-Man's opposition and any cross-motion due on August 3,  
21 2007, AEI's reply and opposition to any cross-motion due on August 10, 2007, and Z-Man's sur-  
22 reply due on August 17, 2007. (Initial Order at 1.)

23 In May 2007, the Court changed its law and motion day from Fridays to Thursdays. On  
24 June 1, 2007, the Court ruled on Z-Man's Motion for Judgment on the Pleadings and AEI's  
25 Motion to Dismiss. ("June 1 Order") In the June 1 Order, the Court continued the hearing on  
26 dispositive motions by six days — from Friday, August 31, 2007 to Thursday, September 6,  
27 2007. (June 1 Order at 11.) AEI understood that the Court's June 1 Order also continued the  
28 briefing dates by six days, as is the practice under the Local Rules.

On July 19, 2007, counsel for the parties spoke regarding various outstanding discovery issues. (Declaration of Geoffrey Graber (“Graber Decl.”) ¶ 2.) In particular, Z-Man indicated that Z-Man intended to take discovery on the co-inventorship issue during August. (*Id.*) In response, AEI noted that the parties would be briefing their dispositive motions in August and expressed concern that Z-Man would use such discovery as an excuse to delay the hearing on dispositive motions. Z-Man then asked when AEI’s brief was due. (*Id.*) AEI responded that under the Court’s Orders, AEI’s opening brief was due on July 26, 2007. (*Id.*) Z-Man did not indicate that this conflicted with Z-Man’s interpretation of the Court’s Orders. (*Id.*) Instead, Z-Man simply noted that it might not make sense for the parties to brief dispositive motions during discovery. (*Id.*; *see also*, Creason Decl. ¶ 7, Ex. G [7/19/07 Ltr. from Graber to Rogers].)

One week later, on July 25, 2007, AEI contacted Z-Man regarding certain portions of a deposition transcript to be filed the next day in AEI’s Motion for Summary Judgment. (Creason Decl. ¶ 3, Ex. C [Email Correspondence].) On the morning of July 26, 2007, Z-Man responded, stating that it was “surprised” to learn that AEI would be filing its summary judgment motion the next day, and asserted that AEI’s filing deadline had passed on July 20, 2007. (*Id.*) Z-Man stated that if AEI filed its summary judgment motion on July 26, Z-Man would “move to strike it as untimely and prejudicial since the late filing will mean that Z-Man has six fewer days to respond than the Court ordered.” (*Id.*)

AEI responded to this email, explaining that the Court’s six-day continuance of the hearing date continued the briefing deadlines by six days. (*Id.*) AEI further noted that Z-Man would not be prejudiced because it would have two weeks to file its opposition and cross-motion (on August 9), as provided under the Court’s Initial Order. (*Id.*) AEI filed its Motion for Partial Summary Judgment on July 26, 2007 and Z-Man filed this Motion to Strike on July 30, 2007.

### **III. Z-MAN’S MOTION SHOULD BE DENIED BECAUSE THE BRIEFING DEADLINES WERE CONTINUED AS A RESULT OF THE COURT’S CONTINUANCE OF THE HEARING DATE**

Z-Man’s Motion to Strike AEI’s Motion for Summary Judgment should be denied. According to Z-Man, the Court maintained the original briefing schedule despite the fact that it continued the dispositive motion hearing date by six days. This is wrong. Local Rule 7-7(d)

provides that “unless the order for continuance specifies otherwise, the entry of an order continuing the hearing of a motion automatically extends the time for filing and serving opposing papers or reply papers to 21 and 14 days, respectively preceding the new hearing date.” N.D. Cal. Civ. LR 7-7(d). The Court’s six-day continuance of the hearing date in this case automatically altered the briefing deadlines by six days as well. Contrary to Z-Man’s suggestion, nowhere in the June 1 Order did the Court state that the briefing schedule remained the same.

Accordingly, Z-Man’s Motion to Strike should be denied.

#### **IV. Z-MAN’S MOTION TO STRIKE SHOULD BE DENIED EVEN IF AEI’S INTERPRETATION IS NOT CONSISTENT WITH THE COURT’S INTENT**

Even if the Court intended to leave the original briefing schedule intact, Z-Man’s Motion to Strike should be denied. First, as noted above, AEI’s interpretation of the Court’s Orders was reasonable. In general, under the Local Rules, an order continuing the hearing date of a motion automatically continues the briefing deadlines. AEI should not be barred from filing a dispositive motion after interpreting the Court’s Orders in a manner consistent with the Local Rules.

Second, AEI would be severely prejudiced if it were barred from filing its dispositive motion because it would be forced to go to trial on the several issues on which it moved for summary judgment. In contrast, Z-Man suffers absolutely no prejudice under AEI’s interpretation of the Court’s Orders and has even filed an alternative motion seeking a briefing schedule that is consistent with AEI’s understanding of the Court’s Orders.

Third, granting Z-Man’s motion would result in the needless waste of judicial resources. AEI has moved for summary judgment on four issues in an effort to streamline this case for trial. AEI believes that the Court is likely to grant summary judgment on each of these issues. It would be a waste of judicial resources if Z-Man were permitted to try these issues to the Court, when they could be resolved based on currently undisputed facts.

Fourth, the Motion to Strike should be denied because Z-Man has (once again) engaged in questionable litigation tactics. Z-Man does not dispute the fact that it was informed on July 19, 2007 that AEI would file its motion for summary judgment on July 26, 2007. (Cf. Graber Decl. ¶ 2, with Motion to Strike at fn. 2.) Z-Man also does not dispute that it failed to acknowledge at

1 that time or during the next week that there was any disagreement regarding the briefing schedule  
 2 in this matter. (*Id.*) Nevertheless, a week later Z-Man claimed it was “surprised” that AEI would  
 3 be filing its Motion for Summary Judgment on July 26. (Creason Decl. ¶ 3, Ex. C [Email  
 4 Correspondence].) The Court should not sanction such gamesmanship.<sup>1</sup>

5 Z-Man’s gamesmanship is particularly inappropriate if one considers how courteously  
 6 AEI treated Z-Man when Z-Man made a docketing error on a deadline earlier this year. When  
 7 Z-Man failed to file an opposition to AEI’s Motion to Dismiss Z-Man’s Second Amended  
 8 Counter-Complaint, AEI immediately called Z-Man day to remind Z-Man of the filing deadline.  
 9 When Z-Man explained that there had been a calendaring error by its law firm, AEI agreed to  
 10 adjust the briefing schedule to allow Z-Man to file its brief late. (Graber Decl. ¶ 3, Ex. A [Stip  
 11 and Order re Briefing Schedule].)

## 12 CONCLUSION

13 Z-Man’s Alternative Motion to Amend Briefing Schedule should be granted and Z-Man’s  
 14 Motion to Strike AEI’s Motion for Partial Summary Judgment should be denied.

15 Dated: August 1, 2007

MORRISON & FOERSTER LLP

17 By: /s/ Jennifer Lee Taylor  
 18 Jennifer Lee Taylor  
 19 Attorneys for Plaintiff/Counter-Defendant  
 20 APPLIED ELASTOMERICS, INC.

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 26 <sup>1</sup> AEI does not believe it is necessary to respond to Z-Man’s statements regarding its  
 27 interpretation of the Court’s July 13 Order on Z-Man’s motion to continue the trial date and other  
 28 dates, as the parties have stipulated to allow Z-Man to schedule its desired third-party depositions  
 on a schedule that is convenient to Z-Man.